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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PETE WILSON,
GOVERNOR OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

VOTING RIGHTS COALITION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND UNITED STATES REPRESENTATIVES CARLOS MOORHEAD, DAVID DREIER, ELTON GALLEGLY, KEN CALVERT, HOWARD P. McKEON, RANDY CUNNINGHAM, ROBERT DORNAN, STEPHEN HORN, JAY KIM, RON PACKARD, DANA ROHRABACHER, JERRY LEWIS, CHRIS COX, ED ROYCE, WALLY HERGER, DUNCAN HUNTER, JOHN DOOLITTLE, BRIAN BILBRAY, FRANK RIGGS, BILL BAKER, SONNY BONO, AND ANDREA SEASTRAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000 supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public

interest, and has a particular interest in ensuring that the rights of states are fully respected by the federal government. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before the this Court, as well as other courts across the country.

WLF has argued in a number of courts against the constitutionality of the statute at issue here, the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1, *et seq.*, popularly known as the "motor voter" statute. WLF filed *amicus* briefs in the district court and appeals court below supporting California's position. WLF also filed an *amicus* brief in support of Michigan in its similar litigation, *ACORN v. Miller* (W.D. Mich. No. 4:95-cv-45). In addition, WLF's Legal Studies Division has published a paper analysing constitutional issues raised by the statute. *See* Maureen E. Mahoney & Michael J. Guzman, *With Motor-Voter Bill, Congress May Have Invited A Constitutional Challenge* (1994).

United States Representatives Carlos Moorhead, David Dreier, Elton Gallegly, Ken Calvert, Howard P. McKeon, Randy Cunningham, Robert Dornan, Stephen Horn, Jay Kim, Ron Packard, Dana Rohrabacher, Jerry Lewis, Chris Cox, Ed Royce, Wally Herger, Duncan Hunter, John Doolittle, Brian Bilbray, Frank Riggs, Bill Baker, Sonny Bono, and Andrea Seastrand are Members of the California delegation to Congress. Because the Act would unconstitutionally impose additional costs on their constituents and would increase the burdens on state and local government services, these legislators oppose the position of the United States and the private plaintiffs in this case.

All parties have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The National Voter Registration Act of 1993 intrudes deeply into the governmental operations of the states and imposes costly affirmative obligations on the states. Consequently, its constitutionality has been challenged by seven states across the country, including California. These cases have arisen either as actions brought by a state against the United States, as actions brought by the United States or private groups against a state, or both (as here). Four of these cases, counting this one, are still pending. In view of the efforts by numerous states to have the Act declared violative of their sovereignty, this Court should address the issues presented.

2. With the Act, Congress has conscripted state resources in the same manner as the federal statute that this Court struck down in *New York v. United States*, 112 S. Ct. 2408 (1992): it compels the states' participation, compels state legislatures to enact legislation, compels state personnel to carry out the federal scheme, and compels state expenditures.

3. The power of Congress, under Article I, Section 4, to "make or alter" State laws and regulations that determine the "Times, Places and Manner of holding Elections for Senators and Representatives" does not validate the Act. The text and historical background of the provision, as well as this Court's decision in *New York*, indicate that Article I, Section 4 does not authorize the Act's conscription of state resources.

ARGUMENT

I. The Constitutionality of the National Voter Registration Act Is An Issue of Nationwide Significance and Nationwide Litigation

Even if the issue presented here affected only California's voter registration program, and were irrelevant to that of any other state, the consequences of the decision below would be considerable. The National Voter Registration Act not only upends current California law on voter registration, but requires the state to provide costly services in connection with registration.

Specifically, the Act provides, *inter alia*, that (1) each State must appoint a "chief State election official" who shall be ultimately responsible for implementation of the Act and coordination with other affected state agencies, 42 U.S.C. § 1973gg-8; (2) States must modify their driver's license application and renewal forms so that they also act as voter registration forms, 42 U.S.C. § 1973gg-3; (3) States must designate, as federal voter registration agencies, all state agencies that provide food stamps, Medicaid, services related to the Women and Infant Children program, services related to Aid to Families with Dependent Children, and agencies providing services to the disabled; (4) employees in these offices must provide "[a]ssistance to applicants in completing voter registration application forms," 42 U.S.C. § 1973gg-5(a)(4)(A); and (5) States must permit citizens to register by mail and must replace existing forms that do not meet the restrictive specifications of the Act, 42 U.S.C. § 1973gg-4.

Federal law now imposes these burdens upon California even though it is easy for Californians to register

and vote. California law has provided for voter registration by mail since 1976, with no requirement to appear before an election official; registration forms, which are pre-addressed and postage-paid by the state, are widely available at governmental and private locations. *See* Cal. Elections Code §§ 2158, 2161, 2163-64. Moreover, Californians may vote by mail. *See id.* § 12280 *et seq.*

But the Act is not, of course, limited to California; indeed, it is displacing state registration laws nationwide. Of 38 states that responded to a Federal Election Commission survey, 21 states already had some form of "motor voter" law—but they were still not in compliance with the Act. "In most cases . . . these programs were 'passive' in that voter registration forms were merly made available to clients without the active involvement of the motor vehicle clerks. They thus fell short of the full requirements of the NVRA." U.S. Federal Election Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office* 8 (1993-1994) (hereinafter *Federal Election Commission Report*).

Likewise, 13 of the 38 states offered voter registration at public assistance agencies. "But once again, most of these programs were 'passive' in that registration forms were merely made available to clients without the active involvement of the public assistance workers." *Id.*

As a result of these new and unreimbursed federal mandates, the constitutionality of the Act is not just the subject of this action, but of litigation by states across the country. Three states have unsuccessfully opposed the Act in court on constitutional grounds, including the grounds asserted by California here. *See ACORN v. Edgar*, 56

F.3d 791 (7th Cir. 1995) (Illinois); *ACORN v. Ridge*, 63 U.S.L.W. 2631, 1995 WL 136913 (E.D. Pa. Mar. 30, 1995) (Pennsylvania); *Commonwealth of Virginia v. United States* (E.D. Va. Oct. 18, 1995) (Virginia). These states have elected not to seek review of these decisions.

Moreover, in addition to California, three states now have lawsuits pending in which they assert constitutional challenges to the Act. *See ACORN v. Miller*, W.D. Mich. No. 4:95-cv-45 (Michigan); *League of Women Voters of New Hampshire v. Merrill*, D.N.H. No. 95-232-M (New Hampshire); *Condon v. Reno* (D.S.C. Nov. 20, 1995), *appeal from dismissal filed*, Nov. 30, 1995 (South Carolina).[1]

In light of the fact that seven states either are asserting constitutional challenges or have recently done so, this Court should review the decision below and provide guidance to the lower courts on the issues presented.

II. The National Voter Registration Act Commandeers State Agencies in Contravention of the Tenth Amendment

The Tenth Amendment makes explicit a relationship between the Federal government and the states that is apparent throughout the text and structure of the Constitution. The Federal government exists by virtue of delegated powers, and "[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the

---

[1] Because the Act provides for enforcement actions by both the Attorney General and private parties, 42 U.S.C. § 1973gg-9, it is very likely that additional litigation will arise as implementation of the Act continues.

States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. While the intent of the Tenth Amendment is clear, this Court has struggled at times to determine whether the Tenth Amendment imposes some *substantive* limit on congressional regulation of states. *See, e.g.*, *Maryland v. Wirtz*, 392 U.S. 183 (1968) (state schools and hospitals are subject to the Fair Labor Standards Act); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities*).

In contrast, this Court has consistently held that the Tenth Amendment, in combination with the limited nature of the powers granted Congress in Article I, acts as a check on the *manner* in which Congress may implement federal programs. In *New York v. United States*, 112 S. Ct. 2408 (1992), for example, the Court concluded that the Constitution does not authorize Congress to direct the states to administer a federal regulatory program. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 112 S. Ct. at 2421.

In *New York*, this Court invalidated a portion of a federal program on the ground that it impermissibly infringed upon state legislative authority. The Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Radioactive Waste Act") created various incentives and milestones for states to establish dump sites for low-level radioactive waste. *See* 42 U.S.C. § 2021b *et seq*. The program, however, was not purely voluntary. One

provision required the States either to regulate "according to the instructions of Congress" or to take title to waste generated within their borders and indemnify its producers. Reasoning that this "enforcement" provision "would 'commandeer' state governments into the service of federal regulatory purposes," the Court struck down that part of the program as beyond the power of Congress.

At least four characteristics of the Radioactive Waste Act led the Court in *New York* to conclude that state resources had been "commandeered:" (i) compliance with the Act was mandatory; (ii) the Act required state governments to *enact* a federal legislative program; (iii) the Act required state governments to *administer* a federal regulatory program; and (iv) the Act compelled a significant expenditure of state funds.

The National Voter Registration Act conscripts state resources in furtherance of a federal voter registration scheme in the same manner that the Court found impermissible in *New York*. First, the "enforcement" provision of the Radioactive Waste Act was mandatory. States had no choice but to enact a federal regulatory program or take title to all the low-level radioactive waste generated within their borders. *See New York*, 112 S. Ct. at 2428. Likewise, the National Voter Registration Act is compulsory. The Act speaks in the imperative voice: "Each State shall establish procedures to register to vote in elections for Federal office." 42 U.S.C. 1973gg-2(a).

Second, the impermissible portion of the Radioactive Waste Act would have required state legislative action —either to enact the Federal standards or to deal with the consequences of the state's sudden ownership of low-level radioactive waste. Similarly, the National Voter

Registration Act forces state governments to designate state agencies as federal voter registration agencies and to enact legislation to comply with federal standards, including making appropriations and amending state laws. In fact, compliance with the National Voter Registration Act will require a number of states (including South Carolina, Vermont, and Virginia) to amend their constitutions. See *Federal Election Commission Report*, *supra*, at 7.

Third, the Radioactive Waste Act required state authorities to design and implement plans for compliance with the Federal program. *See* 112 S. Ct. at 2428. Similarly, the National Voter Registration Act enlists state motor vehicle and social benefits employees who previously had no election responsibilities. It requires states, *inter alia*, to modify their motor vehicle forms, provide registration assistance, and process forms within a ten-day time limit. Congress provided no federal personnel to perform any of these tasks and did not delegate responsibility for implementation to any federal agency.

Finally, in *New York*, the Court found that requiring states to take title to radioactive waste would "in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *New York*, 112 S. Ct. at 2428. The National Voter Registration Act is similar but more direct. It requires the state to expend significant state funds in furtherance of federal goals. There is no question that states will be required to bear the bulk of the Act's costs, whether by direct expenditures, increased payrolls, diverted resources or some combination of all three. The only federal financial assistance provided for by the Act—reduced postal rates for certain mailings—does not nearly offset the states' burdens.

Because the National Voter Registration Act mandates a state's participation, necessitates state legislative action, enlists state personnel, and compels state expenditures, there can be little question but that it commandeers state governments. This Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982). This Court should decline to do so as well.[2]

III. Article I, Section 4 Does Not Give Congress the Power to Conscript State Resources

Contrary to the contention of the United States and the private plaintiffs, Article I, Section 4 does not give Congress authority to regulate national elections by the means chosen in the National Voter Registration Act. Section 4 authorizes Congress to regulate congressional election procedures directly, not indirectly via the states. "No matter how powerful the federal interest involved, the

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[2] Consistent with *New York*, however, Congress is free to regulate registration procedures in several familiar ways. For example, Congress could have "federalized" registration procedures for federal elections, thereby preempting state advance registration schemes. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congress in lowering minimum voting age to 18 years in national elections); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (requiring states to "consider" implementation of a Federal program). Likewise, Congress could have "encouraged" states to join in a national registration program by conditioning the receipt of related federal funds on participation. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (receipt of federal highway funds conditioned on adopting minimum drinking age).

Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 112 S. Ct. at 2429.

The court below, like the Seventh Circuit, interpreted Article I, Section 4 as giving Congress power to enact the NVRA. *See* Pet. App. 8a-9a; *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995). Because the provision leaves states with responsibility for conducting elections, a process that necessarily involves *some* expenditure of resources by the state, these courts concluded—illogically—that it creates an unlimited power to impose election-related mandates on the states, no matter how costly (and no matter how unrelated to election administration are the normal duties of the conscripted state employees), as an incident of congressional authority to regulate elections.

Nothing in the drafting history of Article I, Section 4 suggests that the Framers understood it to permit such unlimited congressional commandeering, and it should not be construed to do so. Rather, like many of the structural features in the first Article, Section 4 represents a careful compromise among differing views about the power and accountability of Congress. *See* 2 J. Story, *Commentaries on the Constitution of the United States* 280-92 (1st ed. 1833). The Framers understood well that power over congressional election procedures was, in some respects, power over the nature and conduct of Congress itself. They further recognized that such procedures could be abused by either Congress or the states.

Those fearful of an excessive and unresponsive national government worried that Congress might manipulate election procedures so as to favor a certain group or class —likely themselves:

> The proposed Congress may make the whole state one district, and direct that the capitol (the city of New York, for instance) shall be the place for holding the election; the consequence would be that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class.

Brutus, No. 4, Nov. 29, 1787, in 2 Philip Kurland & Ralph Lerner, *The Founders' Constitution* 251 (1987).

On the other hand, ardent Federalists like Madison and Hamilton believed that the power to regulate elections must be vested at least in part with Congress. Otherwise, the states might manipulate the rules to advance their own parochial interests or to subvert the national government by refusing to hold elections altogether. Defending the scheme of shared power embodied in Article I, Section 4, Hamilton wrote:

> [E]very government ought to contain in itself the means of its own preservation . . . . Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.

The Federalist No. 59, at 168 (Alexander Hamilton) (Roy P. Fairfield, ed. 1966).

In view of these competing concerns, the Framers adopted a compromise. Article I, Section 4 states that:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.

The result of this compromise is that states hold primary authority to regulate the conduct of congressional elections. Congress, however, may preempt or supplement any state regulation it deems unsatisfactory. *See Oregon v. Mitchell*, 400 U.S. 112, 122-23 (1970).

The compromise in Article I, Section 4 is significant. By explicitly creating a scheme of shared powers, the Framers ensured that if one body attempts to abuse election procedures, there will likely be an automatic constituency to resist. Thus, Justice Story presumed that the Article I, Section 4 power would "not be resorted to by Congress until there has been some extraordinary abuse or danger." *See* 2 Story, *Commentaries* 293, 299. Moreover, an intentional scheme of shared powers casts a long shadow of doubt on any claim that congressional power in Article I, Section 4 is so vast as to override the provisions and structure of federalism found in the Constitution.

The Court in *New York* confirmed the historical view of Article I, Section 4: Regardless of the source of federal

authority or the strength of the federal interest, Congress may not commandeer. In defense of the National Voter Registration Act, Respondents argue that because Article I, Section 4 authorizes Congress to regulate election registration procedures, the Act must be constitutional. This simple syllogism ignores the Court's holding in *New York*, which rejected that precise argument.

In *New York*, the United States contended that "the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission." 112 S. Ct at 2429. The Court unequivocally repudiated that suggestion:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

112 S. Ct. at 2429.

There is no reason to distinguish the holding in *New York* from the present case because the impermissible congressional action there was promulgated pursuant to the commerce clause. First, from a historical viewpoint it is hard to imagine a broader base of congressional power than the commerce clause. According to Professor Tribe, "[t]he

Commerce Clause is both the chief source of congressional regulatory power and, implicitly, a limitation on state legislative power." Laurence H. Tribe, *American Constitutional Law* 305-06 (2d ed. 1988).

Second, there is no textual indication that the Framers gave Congress broader powers to enact commandeering legislation under the Time, Place and Manner Clause than under the Commerce Clause. The only direct interference with state prerogatives that Article I, Section 4 allows is the "alter[ation]" of a state law regulating certain aspects of federal elections. The National Voter Registration Act does much more than merely "alter" existing state registration laws, in view of its conscription of state agencies and state employees, whose responsibilities were outside the elections sphere that Congress is authorized to regulate, to administer the federal program.

Finally, the congressional acts that this Court has upheld in the face of a Tenth Amendment challenge, such as the Fair Labor Standards Act provisions at issue in *Garcia*, did not possess the attributes of commandeering. For example, in *Garcia*, the Court upheld application of the Fair Labor Standards Act's minimum wage and overtime obligations to state mass-transit systems. *See* 469 U.S. 528. The minimum wage and overtime provisions, however, did not on their face require specific state agencies to administer them nor the enacting of state legislation. The minimum wage and overtime provisions required nothing more than an accounting change. Moreover, at the same time that Congress extended these obligations, Congress also "provided substantial countervailing assistance . . . that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area." *Id.* at

554. For these reasons, the Commerce Clause cases permitting regulation of states are inapplicable.

In sum, Article I, Section 4 authorizes Congress to regulate congressional elections in the event that Congress finds some aspect of a state scheme wanting. The congressional authority to regulate national elections, however, does not include the greater power to command the states to administer election registration in accordance with a federal program. *New York* plainly imposes a limitation on the *manner* by which Congress may exercise its authority. Article I, Section 4 should not be construed to authorize the commandeering of state agencies that do not engage in the matters Congress is authorized to regulate, thus upsetting a state's sovereign power to delineate the responsibilities of its own agencies. Because the National Voter Registration Act possesses all of the attributes of commandeering, it should be held to violate Article I and the Tenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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